Supreme Court, U.S.
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92-1868

No. 93-__

In the Supreme Court
OF THE
United States

July Term, 1993

SEA-LAND SERVICES, INC.

Petitioners,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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15pp

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ENTERED ON
MAR 28 1989

FILED ON
MAR 27 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife,	
Plaintiff,	NO. C88-190T
-vs-	
SEA-LAND CORPORATION, a corporation,	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant.	

THIS MATTER having come on regularly for trial to the court sitting in admiralty on March 20, 1989. Harold F. Vhugen and Ronald J. Bland of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz appeared as counsel for plaintiffs and Paul N. Daigle and Bert W. Markovich of

Schwabe, Williamson, Wyatt & Lenihan appeared for the defendant. At the close of the evidence, the case was argued by counsel and submitted to the court for consideration and decision.

The court makes the following Findings of Fact and Conclusions of Law and orders Judgment be entered in accordance herewith.

FINDINGS OF FACT

1. Plaintiffs Clarence F. Tinsley and Marion Tinsley, his wife, at all times material were and are residents of the Western District of Washington residing at Arlington.

2. Defendant Sea-Land Corporation is a foreign corporation licensed to do business and actually doing business in the Western District of Washington with its principal offices at Tacoma.

3. At all times material, defendant Sea-Land Corporation was the owner and operator of the SS

GALVESTON on which plaintiff Clarence F. Tinsley served as chief mate.

4. On September 5, 1987, while in the course of his duties as chief mate aboard the SS GALVESTON, plaintiff fell while attempting to record temperatures on refrigerated cargo vans stowed three tiers high at the #4 hatch aft. Plaintiff fell and landed on a catwalk grating affixed to the stacking from supporting the second tier.

As chief mate plaintiff was required, by defendant, to personally check refrigerated van temperatures twice daily, and on September 5, 1987 he was injured in the course of carrying out this assignment with respect to such a van stowed on the third tier at #4 hatch aft.

5. At all times material there was no catwalk affixed to the stacking me supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.

6. Plaintiff's injuries were proximately caused by the unseaworthiness of the vessel in that defendant failed to provide a safe and reasonable access to the reefer vans on the third tier at hatch #4.

7. The installation of a catwalk to the stacking frame supporting the third tier was shoreside work and was not part of plaintiff's responsibility or duties.

8. As a result of the unseaworthiness of the vessel as aforesaid plaintiff suffered multiple traumatic injuries impacting his head, neck, back, right knee and left ankle.

9. Plaintiff continued in the service of the vessel until it returned to Puget Sound three days later, at which point he was seen by Dr. Jeffrey Remington, an Edmonds orthopedic specialist on September 9, 1987. Plaintiff was next treated by his family physician, Dr. Jonathan Zend of Edmonds on September 21 1987.

10. Following Dr. Remington's assessment, plaintiff returned to the service of the vessel and remained on the

GALVESTON until the vessel laid up on or about October 11, 1987, at which point plaintiff returned to the care of Dr. Jonathan Zend, his family physician.

11. Plaintiff was subsequently referred by Dr. Zend to Dr. Stewart Scham, an orthopedist, who carried out arthroscopic surgery on plaintiff's right knee on February 23, 1988 at Stevens Memorial Hospital, Edmonds. In September of 1988, Dr. Zend referred the plaintiff to Dr. Robert A. Prosser, a neuropsychologist, who carried out a neuropsychological evaluation on September 7, 1988.

12. The preponderance of the medical evidence indicates that as a proximate result of his September 5, 1987 fall aboard the SS GALVESTON, plaintiff suffered a traumatic head injury affecting his vision, memory, concentration and cognitive function as well as injury to his neck, upper back, right knee and left ankle.

13. The totality of plaintiffs traumatic injuries permanently disabled him from returning to his life long occupation as a merchant seaman and deck officer.

14. Clarence F. Tinsley's date of birth is July 16, 1928. On the date of his injury, (September 5, 1987), he was 59 years of age. He is presently 60 years of age and, according to standard tables of mortality, has a life expectancy of 17.51 years.

15. Plaintiff has not been gainfully employed as a merchant seaman since leaving the service of the SS GALVESTON in October 1987. His taxable earnings as a deck officer in the years 1983 through 1987 are as follows:

Year	Earnings
1983	$51,592.33
1984	$57,591.53
1985	$47,736.57
1986	$63,235.69
1987	$45,316.68

(Plaintiff was disabled from April 29, 1987 to July 25, 1987 convalescing from heart bypass surgery and did not work from October 11, 1987 for the balance of the year.)

16. According to defendant's working agreement with the Masters, Mates Pilots union to which plaintiff belongs, the daily base wage for a chief mate on C-4 vessels such as the GALVESTON as of September 1987 was $120.17 per day. This was per day. This was increased to $128.77 effective July 1, 1988 and on July 1, 1989 it is scheduled to increase to $132.63. In addition, according to the agreement, in September of 1987 a chief mate was entitled to twenty-two days paid vacation per month worked. This was increased to twenty-four days on July 1, 1988 and is scheduled to increase to twenty-six days effective July 1, 1989.

17. The daily base wage for chief mates on Class A-2 vessels which replaced the C-4s was $152.03 per day

effective July 1, 1988, and is scheduled to increase to $156.59 effective July 1, 1989.

18. According to the Sea-Land working agreement, the employer is required to fund an Individual Retirement Account Plan (IRAP) equal to 5% of the employee's base wage including vacation days as well as the Masters, Mates and Pilots Pension Plan at a rate equal to 13% of the employee's base wage, including vacation days.

19. According to U.S. Department of Labor Bureau of Labor Statistics, Special Labor Force Report published September 1985, the average number of remaining years of labor force participation for a male age 60 is 5.8 years.

20. Following plaintiffs injury on September 5, 1987, defendant has paid for medical and hospital care in the total sum of $11,386.97. An itemized list of paid medical expenses (cure) paid through December 1988 is as follows:

Stevens Memorial Hospital	$593.00
Jeffrey P. Remington, M.D.	230.00
Richard A. Crone, M.D.	242.00
Dr. Jonathan Zend	3,780.00

Prescriptions	987.79
Stevens Radiologists	486.50
Stewart Scham, M.D.	1,963.00
Stevens Memorial Hospital (arthrogram, 2/10/88)	146.00
Stevens Memorial Hospital (surgery, 2/24/88)	1,625.20
Cyto Lab, Inc.	20.00
Thoms J. Degan, M.D.	83.00
Crutches	40.48
Suburban Anesthesiologists (knee surgery, 2/24/88)	480.00
Robert A. Prosser, Ph.D (neuropsychological evaluation)	710.00
TOTAL	$11,386.97

21. Plaintiff's economic loss, including lost earnings, fringe benefits and non-market services since October 11, 1987 to date, based upon his recent earnings history as chief mate, and after allowance for anticipated federal income tax, totals $97,954.00.

22. The court has taken into account the fact that the economist, Dr. Eugene Silberberg, based his economic loss estimates from the date of plaintiff's injury, September 5, 1987, rather than October 11, 1987, the date plaintiff last

worked. The court has therefore, reduced plaintiff's net economic loss to $97,954.00, $10,000.00 less than Dr. Silberberg's estimate, which is otherwise accurate.

23. Plaintiff's future economic loss, including lost earnings, impaired earning capacity and inability to perform non-market services reduced to present value and after allowance for anticipated federal income tax, totals $448,659.00 based upon an anticipated work expectancy of 5.63 years.

24. Plaintiff Clarence F. Tinsley is entitled to general damages for pain, suffering, disability and loss of enjoyment of life in the sum of $150,000.00.

25. Plaintiff Marion Tinsley is entitled to an award of $25,000.00, for loss of consortium secondary to her husband's injuries and disabilities.

26. Defendant's contention that plaintiff, in the absence of a catwalk, should have utilized portable ladders and stagings to access the third tier refrigerated vans is

rejected as neither practical nor reasonable under the prevailing circumstances. Such methods were not employed on the GALVESTON or an comparable Sea-Land container vessels.

27. At all times material herein, plaintiff Clarence F. Tinsley acted with reasonable care under all of the facts and circumstances.

From the Foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this court pursuant to 46 U.S.C. §688, 28 U.S.C. §1333(l), the general maritime law, and Rule 9(h) of the Federal Rules of Civil Procedure. Venue is proper.

2. All Findings of Fact more appropriately termed Conclusions of Law will be incorporated as such.

3. Defendants ship, the SS GALVESTON, was at all times material herein, unseaworthy at hatch #4.

4. That the unseaworthy condition was the proximate cause of plaintiffs injuries and damages.

5. That plaintiff, Clarence F. Tinsley was not negligent on September 5, 1987.

6. Plaintiffs are entitled to Judgment in their favor and are hereby awarded judgment as follows:

Economic loss (the total of Findings of Fact 21 and 23, supra)	$546,613.00
General damages for pain, suffering and disability	150,000.00
Loss of consortium (Marion Tinsley)	25,000.00
TOTAL DAMAGES	$721,673.00

7. The clerk of the court shall enter judgment in favor of plaintiff.

DATED at Tacoma, Washington, this 24th day of March, 1989.

/s/ Jack S. Tanner
UNITED STATES DISTRICT JUDGE

FILED
OCT 29 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

CLARENCE F. TINSLEY, et al.,	)	No. 89-35278
Plaintiff-Appellee,	)	No. CV 88-190-JET
SEA-LAND CORPORATION,	)	MEMORANDUM*
Defendant-Appellant.	)	

Appeal from the United States District Court
Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
August 7, 1990
Seattle, Washington

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WRIGHT, BEEZER and TROTT, Circuit Judges

Sea-Land Corporation appeals a district court judgment holding it liable to Clarence Tinsley for injuries he sustained as a result of an unseaworthy condition on one of its vessels. We affirm in part, but reverse the court's decision that Tinsley was not comparatively negligent. We remand for a determination of the percentage that Tinsley was at fault for failing to report the unseaworthy condition. The damages already awarded shall be reduced by the percentage of blame assignable to Tinsley.

Clarence Tinsley served as chief mate on the SS Galveston, a ship owned and operated by Sea-Land Corporation. At the time of plaintiff's accident, the Galveston was transporting refrigerated cargo vans ("reefers") from Kodiak, Alaska to Tacoma, Washington. As chief mate, plaintiff was required to make periodic checks of the temperature in each reefer. While involved in that task, he sustained injuries which gave rise to this suit in admiralty.

On September 5, 1987 plaintiff mounted the ladder of a reefer stack near hatch #4 to check the temperature gauge on the third-tier unit. A catwalk had been installed at the second tier, but not at the third tier, to which plaintiff was climbing. As he neared the top of the second reefer, plaintiff reached for the bottom rung of the third-tier ladder and in doing so-hit his head on the protruding frame separating the two reefer levels. The bump caused him to lose his balance and fall to the surface of the second-tier catwalk, where he was injured.

Plaintiff sued under the Jones Act, 46 U.S.C. § 688 (1988), arguing Sea-Land was negligent, and under general maritime law, claiming the absence of a third-tier catwalk at hatch #4 rendered the Galveston unseaworthy. He further alleged that the unseaworthy condition was the sole cause of his injuries. The district court agreed the Galveston was unseaworthy and awarded damages of $721,673.00. Sea-Land timely appeals.

I.

THE "PRIMARY DUTY" DEFENSE

The existence and extent of a duty is reviewed de novo. Armstrong v. United States, 756 F.2d 1407, 1409 (9th Cir. 1985).

It is a principle of maritime law that an employer's "duty to provide a seaworthy ship is absolute and non-delegable." Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1014 (9th Cir. 1966); accord Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 94 (1946); Norris, 2 The Law of Maritime Personal Injuries, §§ 298-303 (3rd ed. 1975). Assumption of risk and contributory negligence are not defenses; rather, a plaintiff's negligence is only relevant to mitigate damages. Seas Shipping, 328 U.S. at 94-95; Hudson Waterways, 365 F.2d at 1014-1015. The seaworthiness doctrine was founded on the belief that, because seamen must expose themselves to obvious dangers, taking orders even when the risk of injury is great, it would be unfair for

ship owners to be able to hide behind the defenses typically available to employers on dry land. A narrow exception to this general principle, called the "primary duty rule," or the "Walker doctrine," was first stated in 1952.[1] The primary duty rule rarely has been applied to deny recovery, however defendant seeks to bring the present case within its ambit.

Judge Learned Hand first articulated the rule in Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952), holding that recovery is barred if a seaman's injuries were due to his breach of "a duty which [he] consciously assumed as a term of his employment." Id. at 773. The Second Circuit refined the rule three years later, stressing that the duty alleged to have been breached must be "independent" of the normal tasks expected of the particular seaman. Dixon v. United States, 219 F.2d 10, 16 (2d Cir. 1955). As the court explained:

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[1]See generally, 1B Benedict on Admiralty §25 (6th ed. 1989).

> [The] result turns really not upon any question of "proximate cause," "assumption of risk" or "contributory negligence," but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.

Id. at 16-17 (emphasis supplied). This narrow construction has been adopted by the Ninth Circuit. California Home Brands. Inc. v. Ferreira, 871 F.2d 830, 836 n.3 (9th Cir. 1989) ("In order for the primary duty rule to apply, the employee must have failed to perform a specific, positive duty for which he had primary responsibility.") (emphasis in the original); Hudson Waterways, 365 F.2d at 1015.

Sea-Land contends that plaintiff, as chief mate, had a primary duty to alleviate the unseaworthy condition created by the absence of a catwalk, relying principally on Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972), one of the few decisions barring recovery on primary duty grounds. The plaintiff in Reinhart, a chief mate, was responsible for spotting defects in wooden sheathing placed in the hold of

the vessel to prevent bombs stored below from coming into contact with the metal hull. He also was responsible for rat inspection. While searching for rats plaintiff fell through a hole he had neglected to spot in the sheathing. The court held the breach of his primary duty to check accurately the sheathing barred any recovery. Over the dissent of Judge Choy, the majority found irrelevant that (1) the actual repair of defective sheathing was the responsibility of home port stevedore, and (2) plaintiff could not have corrected the problem himself. The court emphasized plaintiff's duty had been to inspect for damage, and that plaintiff's failure to do so was the cause of his injuries. Sea-Land urges us to hold that Tinsley's failure to report the absence of the catwalk constituted a breach of a primary duty, even though it was not within his power to install a catwalk himself.

Our most recent formulation of the primary duty rule is found in California Home Brands, 871 F.2d at 835-36. Finding the rule inapplicable in that case, the court held:

"[i]n order for the primary duty rule to apply, the employee must have failed to perform a specific, positive duty for which he had primary responsibility." Id. at 836 n.3. (emphasis added to the word "specific"). Drawing on Walker and Dixon, the court made clear that the duty alleged must be specific. As Learned Hand explained in Walker, the duty must be "consciously assumed as a term of employment." Walker, 193 F.2d at 773. According to Judge (later Justice) Harlan, the duty must be so clearly delineated that, if breached, the employer would have a cause of action against the employee. Dixon, 219 F.2d at 16-17.

By contrast, plaintiff in the present case was told in a highly generalized way that he was responsible for maintaining a safe ship. He was never instructed to make reports detailing where he perceived catwalks were needed. The primary duty rule covers only those situations where the failure to undertake an explicitly assigned duty backfires on the very person who was inattentive to it--where the

connection between the seaman's negligence and his own mishap is so strong as to justify a total bar to recovery.[2]

If we were to accept Sea-Land's position, seamen with broad responsibilities like plaintiff would rarely recover in tort; ironically, they would be responsible for nearly every unseaworthy condition causing them harm. Moreover, ship owners would have an incentive to broadly define the duties of their seamen, with the effect that an assumption of risk standard would begin to prevail in maritime law. Such an outcome would contradict the basic principle that a ship owner's duty to provide a seaworthy ship is absolute and nondelegable.

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[2]For instance, to state the archetypal case where the primary duty rule would apply: "[if] a seaman had spilled oil and then, rejecting an opportunity to wipe it up, had walked in it, it would shock the conscience to allow him to recover." Peymann v. Perini Corp., 507 F.2d 1318, 1322 (1st Cir. 1974), cert. denied, 421 U.S. 914 (1975). The present case is far removed from this type of scenario.

For these reasons, we hold that California Home Brands, not Reinhart, controls this case and that the primary duty rule is inapplicable.

II

THE LACK OF CAUSALITY CLAIM

Questions of causality are fact-based and thus are reviewed for clear error. Armstrong v. United States, 756 F.2d 1407, 1409 (9th Cir. 1985); see also, Trinidad Corp. v. SS Keiyoh Maru, 845 F.2d 818, 822 (9th Cir. 1988) (admiralty court's findings of fact reviewed under clearly erroneous standard). We must affirm unless we are left with a "'definite and firm conviction that a mistake has been committed.'" Trinidad Corp., 845 F.2d at 822 (quoting In re White Cloud Charter Boat Co., Inc., 813 F.2d 1513, 1517 (9th Cir. 1987)). No such mistake was committed here.

Sea-Land argues that the absence of a catwalk on the third tier at hatch #4 is irrelevant since plaintiff fell from a point below where a catwalk would have been, not while he

was attempting to read the temperature gauge. The district court found, however, that the absence of a catwalk did cause plaintiff's injury since the catwalk serves the additional function of providing safer access to the next reefer level up. It is not just a gangplank running from the ladder across the base of the reefer; rather, it has a protective frame through which one would pass before rising onto the grating. This frame would have caught Tinsley as he fell backwards. As stated in the district court's findings of fact:

> 5. At all times material there was no catwalk affixed to the stacking frame supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.
> 6. Plaintiff's injuries were proximately caused by the unseaworthiness of the vessel in that defendant failed to provide a safe and reasonable access to the reefer vans on the third tier at hatch #4.

(emphasis supplied). As plaintiff demonstrates, the record supports the conclusion that a catwalk would have made it safer to climb around the stacking frame, up to the level where the actual "walk" (or gangplank) would have been in

place. We affirm the district court on this point because its findings of fact appear correct, and certainly were not clearly erroneous.

III.

THE PERMANENT DISABILITY CLAIM

The district court's finding that plaintiff was permanently disabled as a result of his fall is an issue of fact, and is therefore reviewed for clear error. Trinidad Corp., 845 F.2d at 822.

Sea-Land contends the district court erred in finding that plaintiff was permanently disabled. It points primarily to differing expert testimony on the subject of disability. The testimony of neither team of experts appears inherently incredible; nothing indicates that one side clearly was right and the other wrong. Thus, we uphold the court's decision to accept the conclusions of plaintiff's experts, notwithstanding Sea-Land's credibility attacks. SEC v.

Rogers, 790 F.2d 1450, 1455 (9th Cir. 1986) (special deference owed to district court's credibility determinations).

IV.

THE DISTRICT COURT'S REFUSAL TO HEAR TESTIMONY

The district court refused to hear the testimony of a Sea-Land employee who would have stated that plaintiff spoke to him after his fall concerning the settlement of an unrelated heart attack claim, and that at this meeting plaintiff asked to be reassigned to another ship or to other duties until he retired. Sea-Land argues Tinsley's inquiry about other work contradicts his claim of being permanently disabled, and that this testimony went to the heart of its case. It therefore asks for a new trial based on the alleged error.

We review a district court's evidentiary rulings for an abuse of discretion, and will not reverse absent prejudice. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1989). In the present case, the district court allowed

defense counsel to offer proof concerning what the testimony of the witness would be. After this colloquy, the court was satisfied the testimony would not add to the trial. The record confirms the testimony would have added little. There was already considerable evidence indicating plaintiff was not faking his injuries and that he was indeed permanently disabled. We therefore find the district court did not abuse its discretion, and that even if it did, withholding the employee's testimony did not materially prejudice Sea-Land's case.

V.

THE COMPARATIVE NEGLIGENCE CLAIM

Finally, Sea-Land argues plaintiff was negligent and that his comparative fault should offset the district court's damage award. The district court's finding that plaintiff was not negligent must be affirmed unless clearly erroneous. Trinidad Corp., 845 F.2d at 822. We hold the court's finding was clearly erroneous.

Sea-Land asserts Tinsley was comparatively negligent because he failed to: (1) devise a safer means of climbing to the third tier of hatch #4, (2) invoke the company directive stating seamen should not climb reefer stacks in dangerous conditions, and (3) report the unseaworthy condition created by the absence of a catwalk. The first two theories are without merit. As to the first, the district court expressly found, based on credible evidence, that a temporary rigging device would have been impracticable, if not unsafe. As to the second, the company directive only authorized Tinsley to abstain from checking reefer temperatures in circumstances such as heavy weather. Under normal conditions, he was expected to climb all reefer stacks, including those without third-tier catwalks.

Whether plaintiff was comparatively negligent in failing to report the unseaworthy condition created by the absence of a catwalk is a different question. Courts generally are reluctant to find seamen negligent in

situations where they have been ordered to carry out dangerous assignments. Under maritime law, the defense of contributory negligence requires evidence of same negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." Tolar v. Kinsman Marine Transit Co., 618 F.2d 1193, 1196 (6th Cir. 1980); accord Akermanis v. Sea-Land Service, Inc., 688 F.2d 898, 904 n.2 (2d Cir. 1982), cert. denied, 464 U.S. 1039 (1984); Furka v. Great Lakes Dredge & Dock Co. Inc., 755 F.2d 1085, 1090 (4th Cir. 1985), cert. denied, 484 U.S. 1042 (1988); CEJA v. Mike Hooks, Inc., 690 F.2d 1191, 1194-95 (5th Cir. 1982); Hall v. American S.S. Co., 688 F.2d 1062, 1065-66 (6th Cir. 1982); Joyce v. Atlantic Richfield Co., 651 F.2d 676, 682-83 (10th Cir. 1981).

Beyond mere acceptance of a dangerous condition, Tinsley was negligent in failing to report that climbing to the third tier was unsafe without a catwalk. When a seaman confronts a condition he knows to be dangerous,

and when he does so on a recurring basis, he may be held negligent for not reporting that condition to his superiors. DuBose v. Matson Navigation Co., 403 F.2d 875, 878-79 (9th Cir. 1968); 1B Benedict on Admiralty § 25 (6th ed. 1989).[3] DuBose involved a suit by a scullion whose leg was injured when other workers repeatedly bumped into him as they carried dishes to be washed. Instead of reporting the problem, plaintiff endured being bumped into for three months, until he finally had to be hospitalized. We affirmed the district court's denial of recovery, holding that plaintiff was

> negligent in not setting in motion circumstances which would bring about a change of conditions, namely, informing his superiors of the bumps he had been receiving so that they could change the course of the dish-runners. Of course, whether appellant had a duty to so inform his

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[3]Rivera v. Rederi A/B Nordstjernan, 456 F.2d 970, 974 (1st Cir.), cert. denied, 409 U.S. 876 (1972); Rivera v. Farrell Lines, Inc. 474 F.2d 255, 258 (2d Cir.), cert. denied, 414 U.S. 822 (1973); Mroz v. Dravo Corp., 429 F.2d 1156, 1164 (3d Cir. 1970); Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510, 514 (4th Cir. 1986), cert. denied, 481 U.S. 1037 (1987); Savoie v. Otto Candies, 692 F.2d 363, 372 (5th Cir. 1982).

> superiors depends upon whether it can be said, as a matter of law, that his continuing to work under the aforesaid conditions created "an unreasonable risk of injury to himself." Kulukundis v. Strand, 202 F.2d 708, 711 (9 Cir. 1953).

DuBose, 403 F.2d at 878 (emphasis in original).

It is conceded in this case that plaintiff knew for quite some time that he was working under an unsafe condition, and that he did not report it to his superiors. Under the circumstances, we find this condition created an unreasonable risk of injury to Tinsley. Moreover, the defect in the ship was rectifiable; plaintiff was not confronted with a general seafaring risk of the kind courts have excused seamen from reporting--such as having to go on deck during a violent sea. Thus, although Tinsley's failure to report the lack of a catwalk at hatch #4 did not constitute a violation of a primary duty, we hold it did constitute negligence.

We address one additional point. The Second Circuit has adopted a narrow exception to the general rule

of comparative negligence. Where the defect is obvious, no report should be required because the seaman's superiors presumably are aware of the problem. The Second Circuit arrived at this conclusion, distinguishing DuBose, in a case where the danger of a slippery floor was "immediately obvious to superiors." Rivera v. Farrell Lines, Inc., 474 F.2d 255, 258 (2d Cir.), cert. denied, 414 U.S. 822 (1973); Guerrero v. American President Lines, Ltd., 394 F.Supp. 333, 336 (S.D.N.Y. 1975). We believe this exception does not apply to the instant case.

Sea-Land's management undoubtedly knew catwalks were not installed at each level of all reefer stacks, but that fact alone tells us little. The crucial question is whether the absence of a catwalk at hatch #4 should have been perceived by Tinsley's superiors as an obvious danger. We believe the danger was obvious only to seamen like Tinsley, who climbed the reefer stacks on a daily basis, and who were thus familiar with all the

acrobatics involved in reaching the temperature gauges of those reefers which were not equipped with catwalks. The danger of the situation was discoverable only in the climb itself, not by casual observation. This is not, for instance, the case of a deck smeared with oil, or a hole in the hull, where the unseaworthy condition is immediately recognizable as unsafe by all concerned. The danger here was only obvious to those initiated in the rites of reefer climbing. We therefore find Tinsley is not excused from his failure to report the unseaworthy condition.

VI.

CONCLUSION

On remand, the district court shall determine the extent to which Sea-Land's liability is offset by Tinsley's negligence, and shall reduce the damage award already calculated according to the percentage of his fault. We emphasize, however, that our opinion should not be read to express a view on what amount of reduction is

appropriate. The district court shall examine this question independently.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Honorable Jack E. Tanner

Filed/Lodged/Received
May 29 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLARENCE F. TINSLEY and MARION TINSLEY, his wife,	
Plaintiffs,	CA No. 89-35278 DC No. C88-190JET
v.	SUPPLEMENTAL FINDINGS OF FACT
SEA-LAND CORPORATION,	AND CONCLUSIONS OF LAW
Defendant.	

THIS MATTER having come on partial remand from the Court of Appeals, having previously been tried to the court sitting in admiralty beginning on March 20, 1989, Harold F. Vhugen and Ronald J. Bland, of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz,

appeared as counsel for plaintiffs, and Paul N. Daigle and Bert W. Markovich, of Schwabe, Williamson, Wyatt & Lenihan, appeared for the defendant. At the conclusion of the trial, findings of fact and conclusions of law were entered on March 24, 1989 with judgment entered in favor of the plaintiffs in the amount of $721,673. Thereafter, the defendant appealed. In its memorandum opinion filed October 29, 1990, the Ninth Circuit Court of Appeals affirmed the trial court's findings in all respects except as to the plaintiffs' comparative fault for failing to report to his superiors the danger in climbing to the third tier at No. 4 hatch in the absence of a catwalk, remanding that issue alone to the trial court for reconsideration.

With respect to the issue of comparative fault, the court having heard oral argument on May 28, 1991, and having considered-the memoranda of both parties and the evidence presented at trial on this issue, now makes the following supplemental findings of fact and conclusions of

law and orders judgment to be entered in accordance herewith:

SUPPLEMENTAL FINDINGS OF FACT

1. Plaintiff was negligent in failing to report that climbing to the third tier of reefers at the No. 4 hatch of the GALVESTON was unsafe without a catwalk.

2. The percentage of Tinsley's negligence considering the totality of the circumstances, including but not limited to the unseaworthy condition created by the absence of the catwalk, is 10%.

From the foregoing supplemental findings of fact, the court now makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Plaintiff Tinsley's comparative negligence under the circumstances was 10%.

2. Plaintiffs' former damage award of $721,673 is thereby reduced by 10% to $654,986.70.

3. Interest on the reduced judgment shall run from March 24, 1989, the date of the original judgment, at the then applicable statutory rate of 9.43%.

DATED at Tacoma, Washington, this 29th day of May, 1991.

/s/ Jack E. Tanner
U.S. DISTRICT JUDGE

Presented by:

LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ
Attorneys for Plaintiff

By: /s/ Ronald J. Bland
RONALD J. BLAND
WSBA #2449

By: /s/ Harold F. Vhugen
HAROLD F. VHUGEN
WSBA #80

Approved as to form:
Paul N. Daigle (per telephone 5/29/91)
for Defendant

ENTERED
ON DOCKET

MAY 30 1991

FILED
MAY 30, 1991

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY
AND MARION TINSLEY,
HIS WIFE
v.

SEA-LAND CORP.

JUDGMENT IN A
CIVIL CASE

Case Number: C88-190T

☐ Jury Verdict. This action came before he Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial ~~or hearing~~ before the Court. The issues have been tried ~~and heard on~~ a decision has been rendered.

IT IS ORDERED AND ADJUDGED

PLAINTIFFS' FORMER DAMAGE AWARD OF

$721,673 IS REDUCED BY 10% TO $654,986.70.

INTEREST ON THE REDUCED JUDGMENT SHALL RUN FROM 3/24/89, AT THE THEN APPLICABLE RATE OF 9.43%.

Date 5/30/91

Clerk BRUCE RIFKIN

/s/ Debby Harrison
(By) Deputy Clerk

ENTERED
ON DOCKET
JUL 11 1991

FILED JUL 11 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife, Plaintiff,	NO. CSS-190T
-vs-	SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
SEA-LAND CORPORATION, a corporation, Defendant.	

THIS MATTER comes on before the above-entitled Court upon partial remand from the United States Court of Appeals for the Ninth Circuit, having previously been tried to the court sitting in admiralty beginning on March 20, 1989. Harold F. Vhugen and Ronald J. Bland of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, appeared as

counsel for plaintiffs, and Paul N. Daigle and Bert W. Markovich, of Schwabe, Williamson, Wyatt & Lenihan, appeared for the defendant. At the conclusion of the trial, Findings of Fact and Conclusions of Law were entered on March 24, 1989 with judgment entered in favor of the plaintiffs in the amount of $721,673.00. Thereafter, the defendant appealed. In its memorandum opinion filed October 29, 1990, the Ninth Circuit Court of Appeals affirmed the trial court's findings in all respects except as to the plaintiffs' comparative fault for failing to report to his superiors the danger in climbing to the third tier at No. 4 hatch in the absence of a catwalk, remanding that issue alone to the trial court for reconsideration.

With respect to eh issue of comparative fault, the court makes the following supplemental Findings of Fact and Conclusions of Law and orders judgment to be re-entered in accordance herewith:

SUPPLEMENTAL FINDINGS OF FACT

1. Sea-Land's contentions concerning comparative negligence as set forth in the pretrial order, though quite specific, make no mention o Tinsley's alleged failure to notify his superiors of the dangerous condition: to wit, the absence of a catwalk between the second and third tier at No. 4, suggesting that Sea-Land itself ascribed little or no significance to Tinsley's failure to report the condition and the issue was not raised at trial.

2. Captain Donald F. Miley, a retired skipper on Sea-Land container vessels, called as an expert on behalf of plaintiff, testified unequivocally that in the absence of a catwalk between the second and third tier at No. 4, he "would feel obliged to do it the same way Mr. Tinsley does."

3. Other crew members on the S.S. Galveston, including Boatswain Dawson, Electrician Bagley, Seaman Stolen, and Third Mate McKay all used the same means of access as plaintiff to reach the third tier reefer vans at No.

4 as had numerous chief mates and crew members in the past.

4. The specific condition which led to Tinsley's fall, the loading of a third tier reefer at No. 4 at Kodiak, was created by the marine department of Sea-Land at Kodiak, and because of the time involved, it was unlikely that defendant Sea-Land could have or would have installed a catwalk at this location had specific notice of the dangerous condition been given by plaintiff or others.

5. A decision to construct a catwalk between the second and third tiers at Hatch No. 4 would have had to have been made by fleet operations for Sea-Land with the approval of the Ship Construction Department in New Jersey, making it extremely unlikely that any remedial action could have or would have been taken had plaintiff notified his superiors before sailing from Kodiak on September 5, 1987.

6. Plaintiff Tinsley's comparative negligence under the facts and circumstances herein was a minimal cause of his injuries.

From the foregoing Supplemental Findings of Fact, the Court now makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Plaintiff Tinsley's comparative negligence was 10% the cause of his injuries.

2. Plaintiffs' former damage award of $721,673 is thereby reduced accordingly.

3. Interest on the reduced judgment shall run from March 24, 1989, the date of the original judgment, based on Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973); Turner v. Japan Lines, 702 F.2d 752 (9th Cir. 1983).

DATED this 11th of JULY 1991 at Tacoma, Washington.

/s/ Jack E. Tanner
UNITED STATES DISTRICT COURT JUDGE

ENTERED
ON DOCKET
JUL 15 1991

FILED JUL 15 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife, Plaintiff,	)	NO. C88-190T
-vs-	)	
SEA-LAND CORPORATION, a corporation, Defendant.	)	ORDER

THIS MATTER comes on before the above-entitled Court sua sponte.

Having considered the entirety of the records and file herein, and finding that Supplemental Findings of Fact and Conclusions of Law and Supplemental Judgment were entered herein on May 30, 1991, it is now

ORDERED that the Supplemental Findings of Fact and Conclusions of Law and Supplemental Judgement entered on July 11, 1991, are hereby vacated.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 15th day of July 1991.

/s/ Jack C. Tanner
UNITED DISTRICT COURT JUDGE

FILED
NOV 20 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	)
Plaintiffs-Appellees,	) No. 91-35762
v.	) D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	) MEMORANDUM*
Defendant-Appellant.	)

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3.

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges.

Sea-Land timely appeals the district court's determination of comparative negligence. We affirm for the reasons that follow. Sea-Land also appeals the district court's award of postjudgment interest from the date of the original judgment. We affirm this award in a separate published opinion.

I.

Sea-Land argues that the district court, contrary to our decision in the first appeal, improperly inferred Sea-Land was aware of the danger of reading third-tier temperature dials without a catwalk. While the district court judge did suggest he believed Sea-Land knew of the danger (ER 69), he acknowledged this court's contrary finding and that he could not overturn it. (ER 70-71). In any event, this court may affirm a district court's decision on any ground fairly

supported by the record, "even if the district court relied on the wrong grounds or wrong reasoning." Marino v. Vasquez, 812 F.2d 499, 508 (9th Cir. 1987). Even if the district court improperly considered Sea-Land's knowledge in determining comparative negligence, its finding that plaintiff was ten percent negligent is adequately supported by the remaining evidence. See Part III.

II.

Sea-Land argues the district court committed an error of law by allocating the most fault to the party least able to avoid injury. The cases Sea-Land relies on are inapposite. See DuBose v. Matson Navigation Co., 403 F.2d 875 (9th Cir. 1968); Superior Oil Co. v. Trahan, 322 F.2d 234 (5th Cir. 1963); Meintsma v. United States, 164 F.2d 976 (9th Cir. 1947). None of these cases involved a condition, like the one at issue here, that could not have been remedied without major structural changes. Trahan and Meintsma

involved failure to make a simple request for assistance. Meintsma, 164 F.2d at 977 (instead of jumping from the gangplank to the dock, plaintiff should have asked someone to lower it); Trahan, 322 F.2d at 237 (plaintiff should not have jumped from one moving vessel to another without requesting assistance). In Dubose, the defendant, had it known of the problem, could have avoided injury to a scullion who was repeatedly bumped by workers carrying dishes to be washed, simply by changing the route of those who carried the dishes. 403 F.2d at 878. In each of these cases, it was fair to assume the defendant would have responded had the plaintiff called the problem to the defendant's attention. In this case, by contrast, as we discuss below, the district court was not clearly wrong in finding it was unlikely that Sea-Land would have taken corrective action if Tinsley had reported the danger.[1/]

[1/]We relied on Dubose in the first appeal in support of the rule that failure to report a dangerous condition may bar recovery. As we note below, the district court's finding that Sea-Land would not have corrected the condition reduced the extent to which Tinsley's negligence

III.

The district court's assessment of comparative negligence was not clear error.[2/]

In ordinary negligence cases, the determination of comparative negligence requires an assessment of the relative fault of the parties. 4 Harper, James & Gray, The Law of Torts § 22.16 at 395-96 (2d ed. 1986). In such cases, the negligence of the parties is weighed without regard to the extent to which either party's conduct proximately caused the injuries. Id. Where a ship is found unseaworthy, however, the owner is strictly liable regardless of fault, Miles v. Melrose, 882 F.2d 976, 981 (5th Cir. 1989), and we compare causation rather than fault. Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129,

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contributed to his injuries.

[2/]Tinsley argues this court should not reach this issue because Sea-Land failed to raise it at trial and addressed it for the first time in the first appeal. The issue of Tinsley's contributory negligence was decided by the panel that heard SeaLand's first appeal without objection from Tinsley. Tinsley has waived any objection to consideration of this issue by failing to raise the objection in the first appeal.

1139 (9th Cir. 1977) ("'comparative causation' is a conceptually more precise term than 'comparative fault' since fault alone without causation does not subject one to liability") (citation omitted). See generally Schoenbaum, Admiralty and Maritime Law § 5-3 (1987); 4 Harper, James & Gray, The Law of Torts § 22.16 at 395-96, 399-400. The defendant bears the burden of proving the extent to which the plaintiff's negligence proximately caused his injuries. See Johnston v. Pierce Packing Co., 550 F.2d 474, 478 (9th Cir. 1977); see also 2 Norris, The Law of Seamen § 27:19 at 243 (4th ed. 1985).

Tinsley's failure to advise Sea-Land of the danger of reading third-tier temperature dials without a catwalk may have been a "but for" cause of his injuries. To determine whether this failure proximately caused Tinsley's injuries, however, a critical question remains to be answered; namely, whether Sea-Land, had it been warned by Tinsley, would have installed catwalks or relieved Tinsley of his obligation

to read third-tier temperature dials.[3/] While Sea-Land makes plausible arguments for blaming the accident more on Tinsley than Sea-Land, nevertheless the district court's determination must be upheld unless clearly erroneous. Accordingly, we review the record to see whether it supports the conclusion of the district court, subject to that highly deferential standard of review.

During the hearing on remand, the district court stated "[t]he problem is it's the last load in. And my experience in hearing these cases: once those kind [sic] of ships are loaded and lashed, they cast off those lines. [Defendant's attorney has] to argue: No, they wouldn't have done that; they would have built a catwalk." (ER 67). According to Sea-Land, this comment reveals the district court did not understand that catwalks could have been welded onto the stacking frames long before the ship was loaded. Sea-Land argues its

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[3/]Sea-Land's argument that it should be absolved of liability entirely because Tinsley was "in the best position to avoid the casualty" fails because it ignores this critical question.

prompt response to other concerns raised in monthly safety meetings demonstrates Sea-Land would have remedied the problem had the danger been reported. (Supp. ER).

It is not so clear, however, that Sea-Land would have built permanent third-tier catwalks for the frames. At trial, William Prindiville, Sea-Land's Region Manager of Fleet Operations, testified that permanent catwalks were a "continuous maintenance problem" and were not worth installing simply because they might be needed on a few voyages a year:

> They bang against the buttresses, they get smashed up when they get handled on the dock, they get damaged when they are stacked on top of each other on the vessel. So anytime there is a catwalk there, it is a struggle to maintain it in a safe working condition.
>
> Since we know we would be carrying reefers on the second tier of No. 4 on a regular basis, to have that catwalk on the upper stacking frame hanging over your head all 35 voyages of the year, when there is a need for it on those 5 voyages only, there would be a hazard to somebody working under there.

(Tr. 301-02).

While Sea-Land argues reports from periodic safety meetings indicate it was responsive to suggestions, the matters raised primarily involved minor repairs or simple requests, such as painting ladders yellow so they could be seen at night. On the other hand, the addition of a catwalk would have been a major structural change requiring approval of fleet operations and the ship construction department. (Tr. 310, 315). Accordingly, the district court was not clearly wrong in finding it was unlikely Sea-Land would have built either a permanent catwalk in advance or a temporary structure just before "cast off."

Similarly, the evidence as to whether Sea-Land would have relieved Tinsley of the obligation to monitor third tier temperature dials is far from clear. Prindiville testified hard frozen loads were stored in the upper tiers because they could survive the voyage without monitoring if weather conditions made temperature reading of upper tiers prohibitive. (Tr. 310). However, Donald Frank Miley, a

retired Sea-Land captain, testified a chief mate could not have refused to read third tier temperature dials. He stated: "such a refusal wouldn't be looked on kindly by either the master of the vessel or the marine superintendent or anybody else, since this type of activity was done by chief mates throughout the rest of the fleet, and if you cared to advance in the company, you wouldn't make that kind of objection." (Tr. 54). Moreover, there was substantial testimony regarding the importance of monitoring temperature, especially when the ship was carrying a large cargo. Under such circumstances, there would be more reefer vans than available electrical sockets, and plugs would have to be rotated to maintain temperatures in all of the reefers. (Tr. 275), (Deposition of Michael Eugene Bagley at 5, 34-35), (Deposition of James Anthony Ramirez at 14, 26). Finally, Sea-Land offered no evidence it would have put an end to third tier temperature reading if it had been advised of the danger. Indeed, it did not make this argument at trial

but first advanced it after the case had been remanded to the district court for an assessment of comparative negligence. Sea-Land offered no additional evidence on this issue on remand but simply argued on the basis of evidence offered at trial that company policy permitted Tinsley to refuse to read third tier reefer temperature dials if he believed it to be dangerous.[4/]

Because Sea-Land bore the burden of proof and there was significant evidence that Sea-Land would not have installed third-tier catwalks or abandoned temperature reading of third-tier reefers, the district court's finding that plaintiff's failure to report the dangerous condition was no more than ten percent of the cause of his injuries was not clearly erroneous.

[4/]We squarely rejected this argument in the first appeal. Tinsley, No. 89-35278 Slip op. at 10 (9th Cir. Oct. 29, 1990) ("[T]he company directive only authorized Tinsley to abstain from checking reefer temperatures in circumstances such as heavy weather. Under normal conditions, he was expected to climb all reefer stacks, including those without third-tier catwalks.").

IV.

Sea-Land argues Tinsley should be held to a higher standard of care because of his position as chief mate. The first treatise Sea-Land cites merely suggests the plaintiff's sailing experience is a relevant consideration in determining contributory negligence. See IB Benedict on Admiralty § 25 at 3-102 (7th ed. 1991). The section of the second treatise Sea-Land quotes is of no relevance here. It discusses discharge of crewmen and officers and suggests that an officer's minor disobedience need not be tolerated because an officer holds a position that requires a high degree of responsibility. See 1 Norris, The Law of Seamap 612-13. Finally, Skandalis v. M/V Galini, 1974 AMC 1671 (E.D. Va. 1974), on which Sea-Land also relies, is inapposite. In that case, a second mate, who was injured while moving a heavy box, was found to be contributorily negligent because he failed to use his authority to ask an inferior seaman to help him. Id. at 1673-75. While Tinsley was chief mate, the

individuals who could have approved a change in stacking frame structures or relieved him of temperature reading duties -- namely, someone in fleet operations or the ship construction department -- were superior to Tinsley in the chain of command. Plaintiff's authority is relevant only to the extent it might have been employed to avert the danger.

V.

Relying on Pan-Alaska Fisheries, Inc., 565 F.2d 1129, Sea-Land argues that where contributory negligence is found in a strict liability case, greater weight should be given to the plaintiff's negligence. Because Sea-Land was held strictly liable, no finding was ever made as to whether Sea-Land-was at fault. Accordingly, Sea-Land argues it should be liable for significantly less damages than Tinsley, who was found to have been negligent. The Pan-Alaska Fisheries case, however, does not support this proposition. To the contrary, as discussed earlier, Pan-Alaska Fisheries held the

appropriate comparison is relative causation not relative fault. 565 F.2d at 1139.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	
Plaintiffs-Appellees,	No. 91-35762
v.	D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	OPINION
Defendant-Appellant.	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
October 9, 1992-San Francisco, California

Filed November 20, 1992

Before: James R. Browning, David R. Thompson and Andrew J. Kleinfeld, Circuit Judges.

Per Curium

SUMMARY

Civil Litigation and Procedure/Torts/Remedies/Negligence/Damages/Litigation and Procedure (Civil)

Affirming a district court judgment, the court of appeals held that because damages in a personal injury action were sufficiently ascertained as of the date of the original judgment when the appeals court ordered a reduction in the damage award in proportion to the plaintiff's comparative negligence, postjudgment interest on the reduced award was proper from the date of the original judgment.

Clarence F. Tinsley obtained a favorable judgment in a personal injury action brought against appellant Sea-Land Corporation. The district court awarded damages to Tinsley. however, on appeal, while affirming the finding of liability, the court held that Tinsley's negligence had contributed to his injuries and remanded for a determination of comparative negligence. The district court found Tinsley ten percent negligent and reduced the damage award

accordingly. The court also ordered Sea-Land to pay Tinsley postjudgment interest on the reduced award from the date of the original judgment.

[1] While interest is allowed on any money judgment in a civil case in district court calculated from the date of the entry of the judgment, interest may not be calculated from the date of a judgment for damages that was not supported by the evidence. [2] Here, the district court's determination of damages was not challenged as unsupported by the evidence or on any other ground, and its judgment was previously affirmed. The district court's determination of damages was viewed as correct to the extent permitted to stand, and interest on a judgment thus partially affirmed should be computed from the day of its initial entry. [3] The court did not need to consider Sea-Land's argument that Tinsley's failure to appeal the district court's omission of postjudgment interest in the original judgment precludes an award of interest. Interest accrues from the date of a

judgment whether or not the judgment expressly includes it, because such interest follows as a legal incident from the statute providing for it.

COUNSEL

Jerome C. Scowcroft, Schwabe, Williamson & Wyatt, Seattle, Washington, for the defendant-appellant.

Ronald J. Bland and Harold F. Vhugen, Levinson, Friedman, Vhugen, Duggan & Bland, Seattle, Washington, for the plaintiffs-appellees.

OPINION

PER CURIAM

This is the second appeal in this personal injury action arising out of an accident on a ship owned and operated by the defendant Sea-Land Corporation. In its original judgment, the district court found the unseaworthy condition

of defendant's ship was the sole cause of plaintiff's injuries and awarded damages of $721,673. On appeal, we affirmed the finding of unseaworthiness, but held plaintiff's negligence had contributed to his injuries and remanded for a determination of comparative negligence. The district court found plaintiff 10% negligent and reduced the damage award accordingly. The court also ordered defendant to pay postjudgment interest on the reduced award from the date of the original judgment. Sea-land timely appears. We affirm.[1]

[1] The award of postjudgment interest is governed by 28 U.S.C. § 1961. See *Kotsopoulos v. Austria Shipping Co.*, 467 F.2d 91, 95 (2d Cir. 1972) (award of postjudgment interest in maritime actions is governed by 28 U.S.C. § 1961). Section 1961(a) provides "[i]nterest shall be allowed on any money judgment in a civil case recovered in the

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[1]In this opinion we state our reasons for affirming the award of postjudgment interest. Our reasons for affirming the district court's determination of comparative negligence are stated in a separate unpublished disposition.

district court" and "shall be calculated from the date of the entry of the judgment." However, interest may not be calculated from the date of a judgment for damages that "was not supported by the evidence." *Kaiser Aluminum & Chemical corp. v. Bonjorno,* 494 U.S. 827, 836 (1990). As the Supreme Court explained in *Bonjorno*:

> "[T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Poleto v. Consolidated Rail Corp.,* [826 F.2d 1270, 1280 (3d Cir. 1987)]. Where the judgment on damages was not supported by the evidence, the damages have not been "ascertained" in any meaningful way.

Id. at 835-36.

[2] The question presented here is whether the damages were sufficiently ascertained as of the date of the original judgment where on appeal this court ordered the district court to reduce the damage award in proportion to the plaintiff's comparative negligence. When the court of Appeals affirms a district court judgment, interest is paid

from the date of the original judgment. *Home Sav. Bank, F.S.B. v. Gillam,* 952 F.2d 1152, 1162 (9th Cir. 1991). Here the district court's determination of damages was not challenged as unsupported by the evidence or on any other ground, and we affirmed that determination. We remanded solely to reduce the award in proportion to the plaintiff's negligence, instructing the district court to "reduce the damage award already calculated according to the percentage of [Tinsley's] fault." Slip. Op. at 13. By contrast, in *Bonjorno,* the court vacated the judgment completely and ordered a new trial on the issue of damages. *See* 494 U.S. at 830. Prior to *Bonjorno,* we had held that deletion of an item of damages does not result in an entirely new judgment. *United States v. Perkins,* 487 F.2d 672, 675-76 (9th Cir. 1973). Rather, "the district court's determination [is] viewed as correct to the extent it was permitted to stand, and interest on a judgment thus partially affirmed should be computed from the date of its initial entry." Id. at 676. The

Supreme Court decision *Bonjorno* did not change this rule because no portion of the original damage award in *Bonjorno* was "permitted to stand." The judgment in this case was permitted to stand to the extent of Sea-Land's responsibility for Tinsley's injuries; an award of interest from the date of the original judgment on this part of the judgment is therefore consistent with *Bonjorno*. *See also Cordero v. De Jesus-Mendez*, 922 F.2d 11, 16-18 (1st Cir. 1990).

[3] Sea-Land argues Tinsley's failure to appeal the district court's omission of postjudgment interest in the original judgment precludes an award of interest. We need not consider this contention because it was raised for the first time in Sea-Land's reply brief. *Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990). In any event, the claim is meritless. "Interest accrues from the date of a judgment whether or not the judgment expressly incudes it, because 'such interest follows as a legal incident from the statute

providing for it.'" *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (quoting *Blair v. Durham*, 139 F.2d 260, 261 (6th Cir. 1943)). *See also United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876 (1st Cir. 1971) ("Regardless of whether the judgment itself contains a specific award of interest, once final judgment has been entered in a civil suit in a federal court the prevailing party becomes a judgment creditor and is entitled to post-judgment interest under the mandatory terms of 28 U.S.C. § 1961.").

Sea-Land relies on *Lettsome v. United States*, 434 F.2d 907, 909-10 (5th Cir. 1970) and *Firth v. United States*, 554 F.2d 990, 995-96 (9th Cir. 1977). Neither is relevant here. These cases were brought under the Suits in Admiralty Act, 46 U.S.C. § 743, and the Public Vessels Act, 46 U.S.C. § 782, which provide for actions against the United States. Interest may be awarded on judgments under those statutes, but, unlike 28 U.S.C. § 1961, the award of interest is not

mandatory. *Lettsome*, 434 F.2d at 910; 46 U.S.C. §§ 743, 782.

AFFIRMED.

FILED
FEB 16 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	)
Plaintiffs-Appellees,	) No. 91-35762
v.	) D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	) ORDER
Defendant-Appellant.	)

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges

In its petition for rehearing and suggestion for rehearing on banc, Sea-Land argues the panel overlooked Ludwig v. Pan Ocean Shipping Co., Ltd., 941 F.2d 849 (9th Cir. 1991). In Ludwig, this court held that a longshoreman was not entitled to recovery for in injury that occurred when

"he stepped down from a ladder onto snatch blocks nestled in a coiled lashing cable located at the bottom of the ladder." Id. at 850. The court held that, as an experienced seaman, Ludwig should have been "mindful" of the hazard. Sea-Land argues that Ludwig requires this court to apply a higher standard of care because of Tinsley's position as Chief Mate. Ludwig, however, is plainly distinguishable from this case. Ludwig could have avoided the danger simply by either looking where he was stepping or by moving the cable and snatch blocks. By contrast, in this case, the danger could have been avoided only by constructing a third-tier catwalk.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.